110

No. 08-426

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

BONNIE HARBUCK,

Petitioner,

v.

HOUSTON COUNTY,
GOVERNOR'S ESTATE, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Georgia Supreme Court

BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED BY PETITIONER

How much money must change hands in financial dealings to constitute a conflict of interest or impartiality of a Judge or Special Master to warrant recusal under the Fourteenth Amendment when the Special Master sold property to the Developer for a profit prior to Petitioner's Quiet Title Action?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Appellant and Petitioner: Bonnie Harbuck

Appellee and Respondents:

Governor's Estate, Walter Griff Clements,
Houston County
Michael Meiner, City of Warner Robins

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BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

COMES NOW, all Respondents herein, and files this Brief in Opposition to Petitioner's Petition for Writ of Certiorari, and shows to the Court the following:

I. STATEMENT OF FACTS

On March 22, 1999, Petitioner Bonnie Harbuck (hereinafter "Harbuck") purchased certain real property on Great Oak Way known as Lot 4, Block A, of Ashley Oaks Subdivision, in Houston County, Georgia, and constructed thereon her residence. The deed conveying said property to her is recorded in Deed Book 1443, Page 570, Clerk's Office, Houston Superior Court. (*"Defendant's Exhibit 1" attached to Brief in Support of Motion for Summary Judgment,* R. 154.) (App. 1) The plat identifying the property purchased by Harbuck and cited in said deed is recorded in Plat Book 49, Page 124, Clerk's Office of Houston Superior Court. (*"Defendant's Exhibit 2" attached to Brief in Support of Motion for Summary Judgment,* R. 155.) (App. 4)

Governor's Estate, LLC (hereinafter "Governor's Estate") is a Georgia Limited Liability Company engaged in real estate development. On December 7, 2005, Governor's Estate purchased the real property adjacent to Ashley Oaks Subdivision (and Harbuck's lot) (App. 5) for the purpose of developing a residential

subdivision. Access to this subdivision to be developed by Governor's Estate is through Great Oak Way of Ashley Oaks Subdivision. (R. 40-41.) (App. 8)

Harbuck brought an action captioned "Petition to Establish Title," claiming adverse possession of certain property identified therein as "*property not paved between Lots 4 A and 11 A on Great Oak Way in Ashley Oaks Subdivision.*" In her Petition, Harbuck claims that she has acquired title to this property by maintaining same through "*the cutting* of *grass, undergrowth, etc.*" for a period of seven (7) years. (*Petition to Establish Title,* R. 4-6.)

Thereafter, on November 14, 2006, Harbuck amended her Petition, in which *she attached* a *new* deed dated the same day of the original deed, *i.e.* March 22, 1999, that she just recorded on November 14, 2006 (the same day she filed the amendment). (App. 9) Said deed purports to convey the same property already conveyed to Harbuck pursuant to the original deed recorded at the time of the purchase of her lot, *i.e.,* Lot 4, Block A, Ashley Oaks Subdivision. (*See* R. 154.) However, the newly recorded deed contained an erroneous plat reference, that being Plat Book 48, Page 76. (*Warranty Deed,* R. 17.) That plat is actually the survey of the entire 10.70-acre tract which was purchased by the developer of Ashley Oaks Subdivision prior to his developing it into a subdivision. (*Defendant's Exhibit 4 and 5, attached to Brief in Support* of *Motion for Summary Judgment,* R. 157 and 158.) (App. 12)

Attorney Arthur H. Clarke, Jr. was appointed Special Master by the Houston Superior Court, and determined that the parties entitled to service of this action included Houston County, the City of Warner Robins, Michael W. Meiner (the owner of the property across the street from Harbuck), Governor's Estate, and Clements Title Service, Inc. (the developer of Ashley Oaks Subdivision and seller to Harbuck). (R. 31-33.)

After conducting a hearing, the Special Master filed an "Interim Report" with the Superior Court. (R. 114-132.) In said Report, the Special Master found that Harbuck's action could not be maintained under her claim of adverse possession, and thus recommended that "Petitioner's claim be dismissed unless she proves that the aforesaid right-of-way was either **abandoned** by the State," or either (a) was not **dedicated** as a public right-of-way; or (b) was not **accepted** by the County. (R. 118 [*Emphasis added*]).

Thereafter, Governor's Estate filed its Motion for Summary Judgment, contending that there was no genuine issue of material fact as to the matter of the dedication of Great Oak Way and its acceptance by the County, and that as a matter of law there can be no abandonment of the right-of-way as claimed by Harbuck. (R. 140, 141, 143-148.) The Board of Commissioners of Houston County also filed a Motion for Summary Judgment along those same grounds. (R. 134, 136-139.)

After an oral hearing on said motions, the Superior Court of Houston County granted summary judgment against Harbuck, finding that there was no genuine issue of material fact regarding color of title, dedication, acceptance, and abandonment as to the property in question. (R. 184-185.) Harbuck then filed her Notice of Appeal to the Supreme Court of Georgia. (R. 1)

II. ARGUMENT AND CITATION OF AUTHORITY TO DENY THE PETITION

A. PETITIONER HEREIN FAILED TO PROPERLY BRING THE ISSUE OF RECUSAL BEFORE THE TRIAL COURT.

There are sufficient safeguards in place in Georgia to ensure an impartial judiciary. Georgia Uniform Superior Court Rule 25.1 requires that a Motion to Recuse be in writing, be accompanied by an affidavit setting forth the facts upon which the Motion is founded and be filed no later than 10 days prior to the hearing or trial which is the subject of the recusal. (App. 13) Harbuck never filed a written motion to recuse. She never filed an affidavit setting forth the facts upon which such motion is founded, and she certainly did not file it timely, having made an oral motion at the start of the hearing in front of the Special Master.

Harbuck's attorney, for the first time, asked that the Special Master recuse himself due to an alleged

appearance of impropriety at the hearing before the Special Master on April 12, 2007. Said Motion was made orally in her opening statement. The trial court denied the motion. (See Petitioner's App. 10)

Petitioner having totally failed to comply with the requirements regarding her motion to recuse, the Trial Court's denial should not be reversed. *Brice v. State*, 242 Ga. App. 163, 529 S.E.2d 178 (2000); *Harris v. State*, 202 Ga. App. 618, 414 S.E.2d 919 (1992). "*An untimely motion to recuse or a motion to recuse that is defective waives the grounds for recusal.*" *Bitt Int'l Co. v. Fletcher*, 259 Ga. App. 406, 409, 577 S.E.2d 276 (2003). Harbuck's attorney simply failed to comply with the procedural safeguards established by the Superior Court rules.

B. PETITIONER'S RECUSAL ARGUMENT FAILS ON ITS MERITS.

Petitioner's contention that the Special Master should have been recused was even addressed on its merits. Petitioner based her motion for recusal on the fact that in 2005, the Special Master, along with two other individuals, deeded land *unrelated* to this action to Respondent Governor's Estate. As the Georgia Supreme Court stated in its opinion, "this single, unrelated transaction does not rise to a level sufficient to show bias worthy of granting a motion to recuse." *Wellons v. State*, 266 Ga. 77, 88 (463 S.E.2d 868) (1995) (to prevail on a motion to recuse, a party must show that the judge harbored a bias stemming

from an extrajudicial source that was "of such a nature and intensity that it would impede the exercise of impartial judgment"); *Ware v. Henry County Water & Sewerage Authority*, 258 Ga. App. 778, 782 (575 S.E.2d 654) (2002) ("The alleged bias of the judge which would warrant a recusal must be of such a nature and intensity to prevent the defendant from obtaining a trial uninfluenced by the court's prejudgment. . . . ")

III. CONCLUSION

Petitioner's question to this Court is both sarcastic and insulting. How much money changes hands has absolutely nothing to do with the issue. Furthermore, the question is moot by virtue of Petitioner's failure to follow the Superior Court Rules and also fails on its merits as this property is wholly unrelated to the real property in issue. Therefore, this petition should be denied.

Respectfully submitted, this 31st day of October 2008.

MICHAEL J. LONG
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311 Margie Drive
PO Box 730
Warner Robins, GA 31099
478/953-4557 – phone
478/953-5022 – fax

Counsel of Record for Respondents

Georgia, Houston Superior Court

BOOK 1443 PAGE 570

Record & return to: H. DAVID MOORE, Post Office Drawer 8269, Warner Robins, Georgia 31095 (912-328-3200)

STATE OF GEORGIA
COUNTY OF HOUSTON

WARRANTY DEED

(Filed Apr. 8, 1999)

THIS INDENTURE, made and entered into this the 22nd day of March, 1999, between CLEMENTS TITLE SERVICES, INC., a corporation organized and existing under the laws of the State of Georgia, party of the first part, hereinafter referred to as "Grantor", and BONNIE HARBUCK, of the State of Georgia and County of Houston, party of the second part, hereinafter referred to as "Grantee."

WITNESSETH: That the Grantor, for and in consideration of the sum of Ten Dollars ($10.00) and other good and valuable consideration, in hand paid at and before the sealing and delivery of these presents, the receipt and sufficiency whereof being hereby expressly acknowledged, has granted, bargained, sold, alienated, conveyed and confirmed, and by these presents does grant, bargain, sell, alien, convey and confirm, unto the said Grantee all of the following described property, to-wit:

All that tract or parcel of land situate, lying and being in Land Lot 162 of the Tenth Land District of Houston County, Georgia, known and designated as Lot 4, Block "A", of a Subdivision known as ASHLEY OAKS, according to a map or plat of survey of said Subdivision prepared by Clements Surveying Co., Inc., certified by Walter G. Clements, Georgia Registered Land Surveyor No. 1967, dated August 22, 1996, a copy of which is of record in Map Book 49, Page 124, Clerk's Office, Houston Superior Court. Said plat and the recorded copy thereof are by this reference thereto incorporated herein and made a part hereof.

The above-described property is conveyed subject to the restrictive covenants set forth in instrument dated September 6, 1996, recorded in Deed Book 1237, Page 494 *et seq.*, Deed Records of Houston County, Georgia; also, subject to easements, building lines and other matters shown on the subdivision survey.

TO HAVE AND TO HOLD the said tract or parcel of land, together with all and singular the rights, members and appurtenances thereof, to the same being, belonging or in anywise appertaining, to the only proper use, benefit and behoof of the said Grantee forever IN FEE SIMPLE.

AND THE SAID GRANTOR warrants and will forever defend the right and title to the above-described property unto the said Grantee, its successors and

assigns, against the claims of all persons whomsoever.

IN WITNESS WHEREOF, the Grantor has signed and sealed this deed on the day and year first above written.

CLEMENTS TITLE SERVICE, INC.

By: /s/ Walter G. Clements
WALTER G. CLEMENTS,
President

Signed, sealed and
delivered in the presence of:

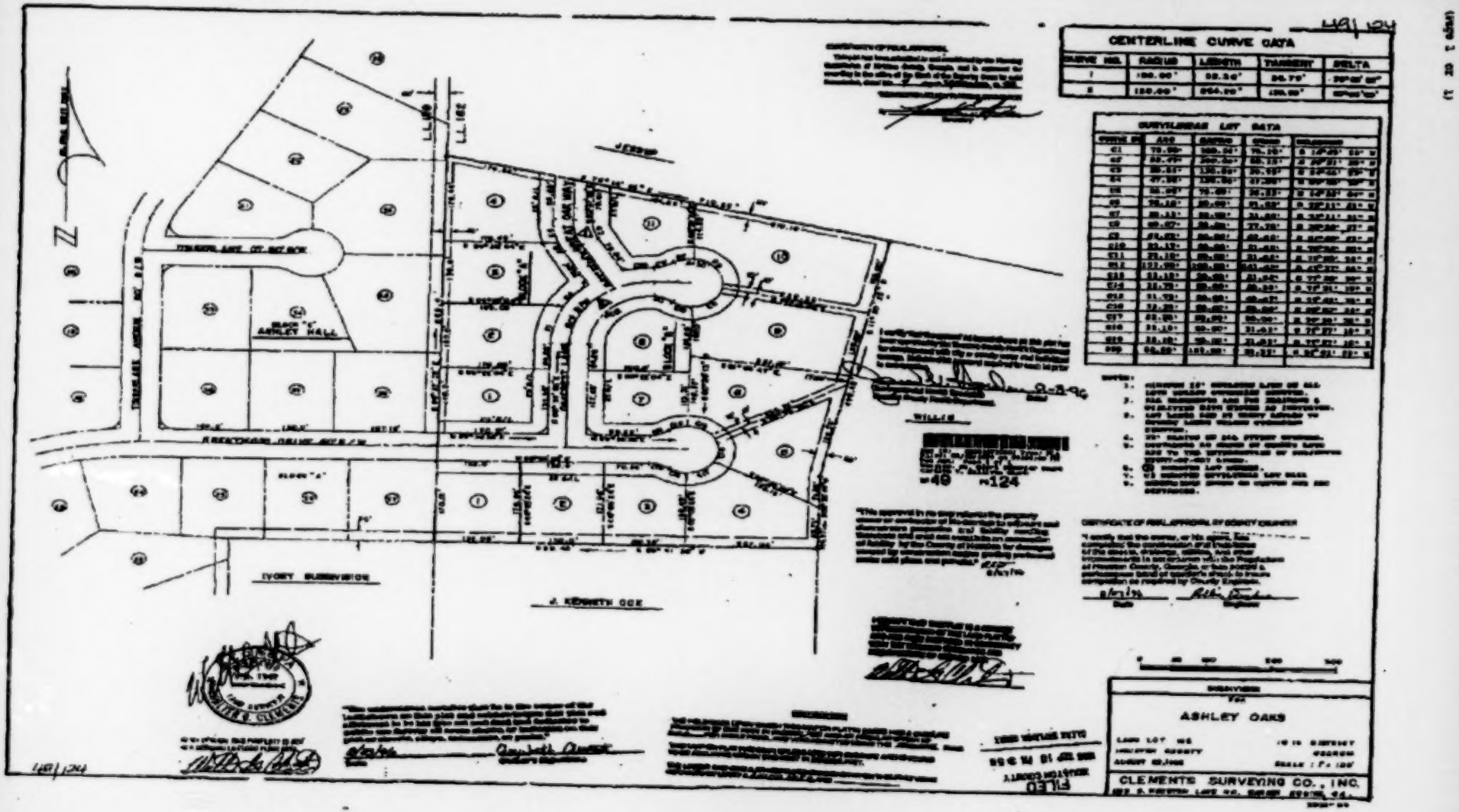
/s/ Mandy D. Noles
Unofficial Witness

/s/ Melissa C. Kirksey
Notary Public

[SEAL]

MELISSA C. KIRKSEY
Notary Public
STATE OF GEORGIA
My Comm. Exp. 11/30/01

App. 4


CENTERLINE CURVE DATA
CURVE NO. | RADIUS | LENGTH | TANGENT | DELTA
SURVEYOR'S LOT DATA
ASHLEY HALL
IVORY SUBDIVISION
J. KENNETH COX
ASHLEY OAKS
CLEMENTS SURVEYING CO., INC.

Return to:
Varner & Adams, P.C.
1719 Russell Parkway
Building 200
Warner Robins, Georgia 31088
05-05611/Governor's Estate, LLC

[BAR CODE]
Doc ID: 007351910001 Type: GLR
Filed: 12/12/2005 at 03:19:01 PM
Fee Amt: $460.00 Page 1 of 1
Transfer Tax: $450.00
Houston, Ga. Clerk Superior Court
Carolyn V. Sullivan Clerk
BK 3665 PG 98

WARRANTY DEED

STATE OF GEORGIA
COUNTY OF HOUSTON

THIS INDENTURE, made this 7th day of December, 2005, between **JOHN D. JESSUP,** of the County of Houston and State of Georgia, as party/parties of the first part, and **GOVERNOR'S ESTATE, LLC,** of the County of Houston and State of Georgia, as party/parties of the second part,

WITNESSETH:

First party, for and in consideration of the sum of TEN DOLLARS ($10.00) and other valuable considerations, receipt whereof is hereby acknowledged, does hereby grant, bargain, sell and convey unto

second party/parties, his/her/their heirs and assigns, the following described property, to-wit:

> All that tract or parcel of land situate, lying and being in Land Lot 162 of the Tenth (10th) Land District of Houston County, Georgia, being known and designated as Parcel 76-9, containing 38.51 acres, more or less, being more particularly shown on an Annexation Plat for Governor's Cove, prepared by McDougald & Associates, LLC, dated November 14, 2005, said plat being of record in Plat Book 66, Page 16, Clerk's Office, Houston Superior Court. Said plat and the record thereof are incorporated herein by reference for all purposes.
>
> This conveyance and the warranties hereinafter contained are made subject to any and all restrictions, easements, covenants and rights-of-way affecting said described property.

TO HAVE AND TO HOLD said property, together with all and singular the rights, members, hereditaments, improvements, easements, and appurtenances thereunto belonging or in any wise appertaining unto second party/parties, his/her/their heirs and assigns FOREVER IN FEE SIMPLE with full WARRANTY OF TITLE to said property against the claims of all persons whomsoever.

IN WITNESS WHEREOF, first party has signed and sealed this deed, the date and year above written.

/s/ John D. Jessup
JOHN D. JESSUP

Signed, sealed and
delivered in the presence of:

/s/ [Illegible]
Unofficial Witness

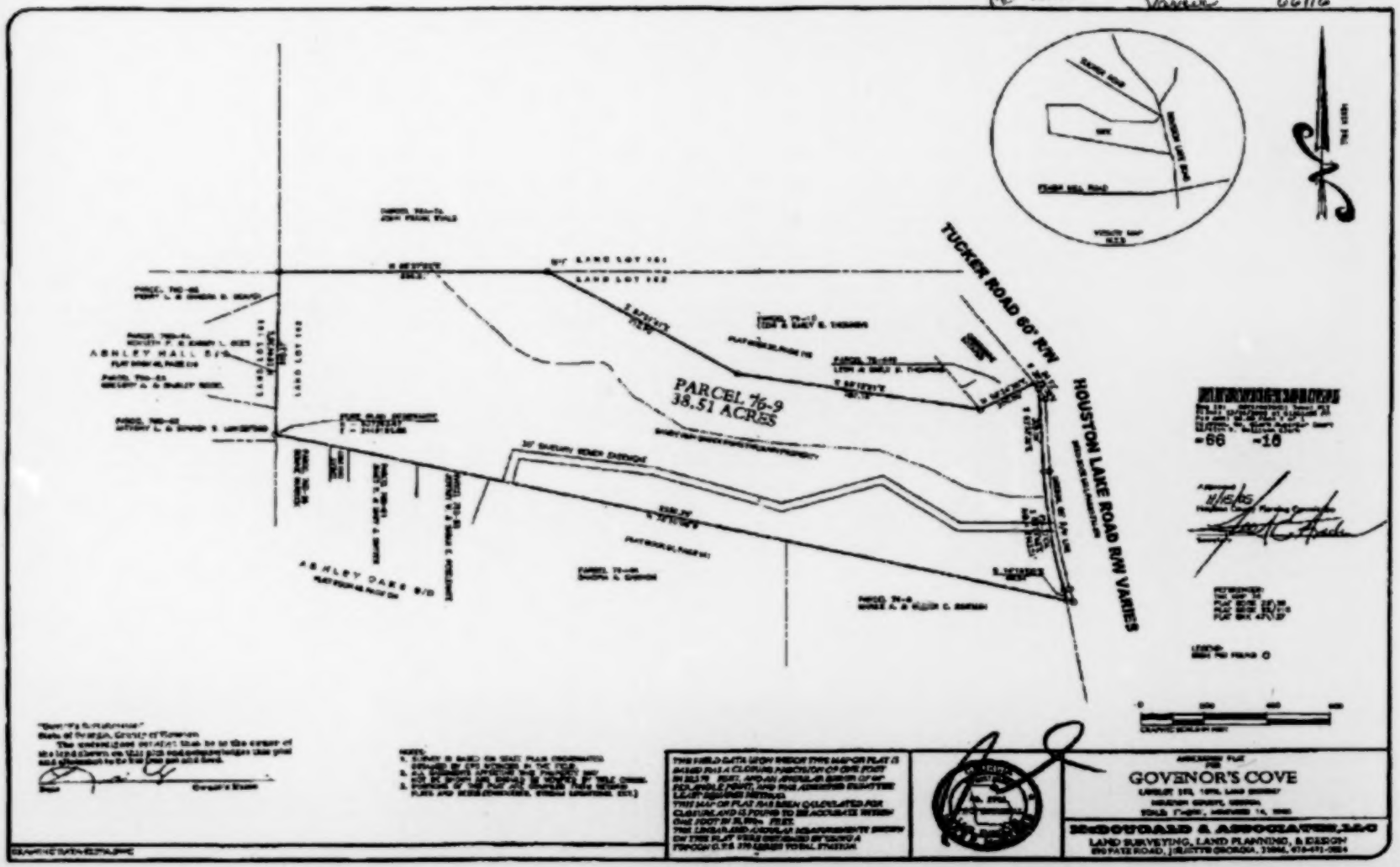
/s/ G.E. Adams
Notary Public

My commission expires:

[SEAL]

G. E. ADAMS
Notary Public
STATE OF GEORGIA
My Comm. Exp. 3/30/08

App. 8


PARCEL 76-9
38.51 ACRES
TUCKER ROAD 60' R/W
HOUSTON LAKE ROAD R/W VARIES
ASHLEY HALL S/D
ASHLEY OAKS S/D
GOVENOR'S COVE
McDONALD & ASSOCIATES, LLC

WARRANTY DEED

[BAR CODE]
Doc ID: 008814660003 Type: GLR
Filed: 11/14/2006 at 09:24:15 AM
Fee Amt: $14.00 Page 1 of 3
Transfer Tax: $0.00
Houston, Ga. Clerk Superior Court
Carolyn V. Sullivan Clerk
BK 4072 PG 169-171

STATE OF GEORGIA, COUNTY OF HOUSTON

THIS INDENTURE, Made the 22 **day of** March, **in the year one thousand nine hundred** 99, **between** Clements Title Service, Inc. **of the County of ___ and State of Georgia, as party or parties of the first part, hereinafter called Grantor, and** Bonnie Harbuck **of the County of ___ and State of Georgia as party or parties of the second part, hereinafter called Grantee (the words "Grantor" and "Grantee" to include their respective heirs, successors and assigns where the context requires or permits).**

WITNESSETH that: Grantor, for and in consideration of the sum of Twenty One Thousand and NO/100* **DOLLARS in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, alienated, conveyed and confirmed and by these presents does grant, bargain, sell, alien, convey or**

confirm unto the said Grantee, all the following described property, to-wit:

> All that tract or parcel of land lying and being in Land Lot 162 of the Tenth Land District of Houston County, Georgia, being known and designated as Lot 4, Block A, Ashley Oaks Subdivision, according to a plat of survey of record in Plat Book 48, Page 76, Clerk's Office, Houston Superior Court. Said plat and the record thereof are incorporated herein by reference for all purposes.

TO HAVE AND TO HOLD the said tract or parcel of land, with all and singular the rights, members and appurtenances thereof, to the same being, belonging, or in anywise appertaining, to the only proper use, benefit and behoof of the said Grantee forever in FEE SIMPLE.

AND THE SAID Grantor warrants and will forever defend the right and title to the above described property unto the said Grantee against the claims of all persons whomsoever.

IN WITNESS WHEREOF, the Grantor has signed and sealed this deed, the day and year above written.

Signed, sealed and delivered in presence of:

/s/ [Illegible] (Seal)

(Seal)

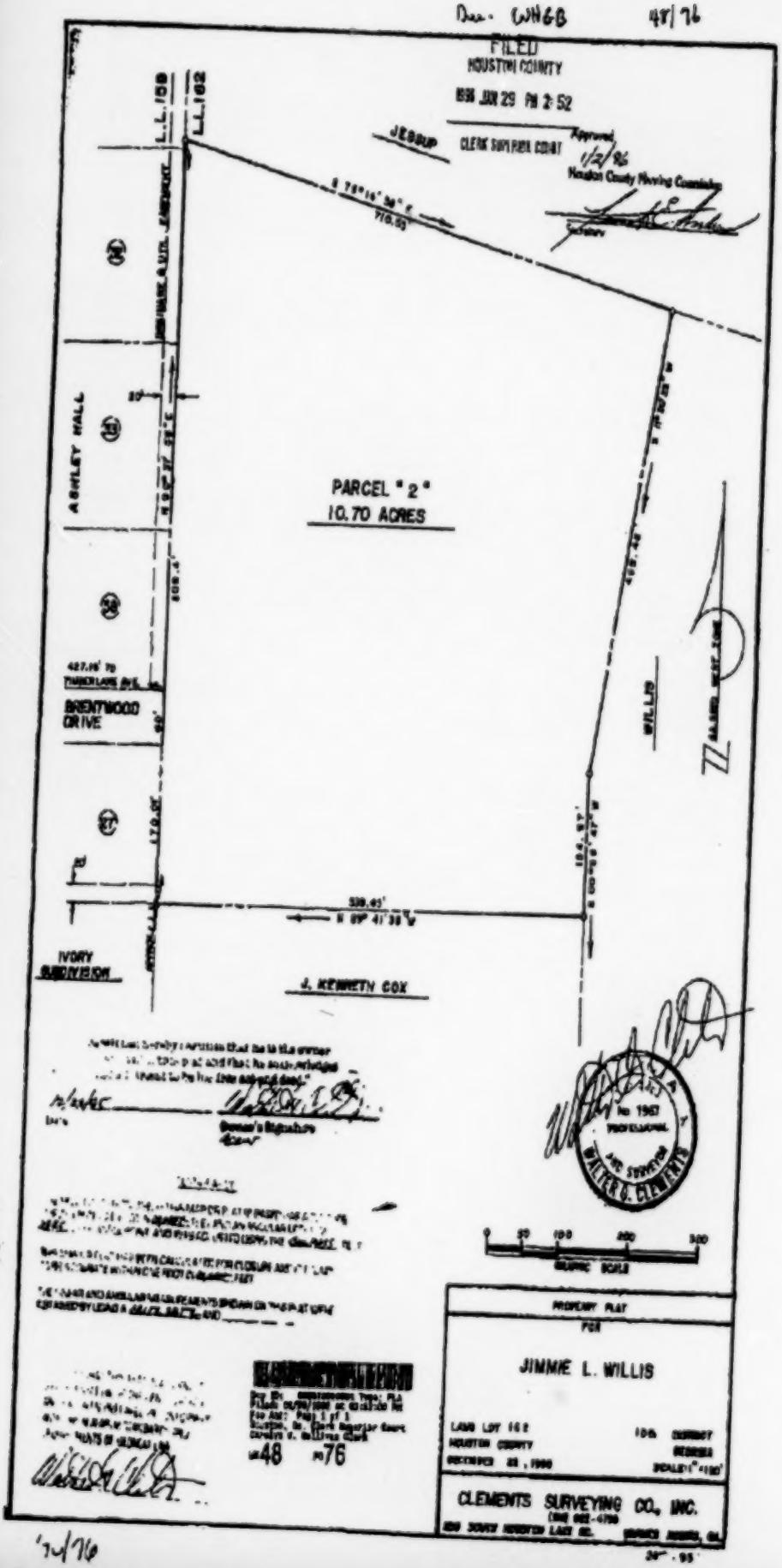
/s/ [Illegible] (Seal)

/s/ [Illegible] (Seal)

Notary Public
Houston County, Georgia

[STAMP]

Dec. WHGB 48/76



App. 12

1/26/76

Uniform Rules for the Superior Courts

Rule 25.1 Motions.

All motions to recuse or disqualify a judge presiding in a particular case or proceeding shall be timely filed: in writing and all evidence thereon shall be presented by accompanying affidavit(s) which shall fully assert the facts upon which the Motion is founded. Filing and presentation to the judge shall be not later than five (5) days after the affiant first learned of the alleged grounds for disqualification, and not later than ten (10) days prior to the hearing or trial which is the subject of recusal or disqualification, unless good cause be shown for failure to meet such time requirements. In no event shall the motion be allowed to delay the trial or proceeding.